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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 UNITED STATES OF AMERICA,
11
12 Plaintiff,

13 v.

14 ERIC WATKINS,
15 Defendant.

Case No. 14-cr-3661-BAS
16-cv-3139-BAS

ORDER:

- 16 (1) **DENYING MOTION TO
VACATE PURSUANT TO 28
U.S.C. § 2255 (ECF No. 151);**
- 17 (2) **DENYING SUPPLEMENTAL
MOTION TO VACATE
(ECF No. 171);**
- 18 (3) **GRANTING IN PART AND
DENYING IN PART FIRST
AMENDED MOTION TO
VACATE (ECF No. 162);**
- 19 (4) **VACATING THE ORIGINAL
JUDGMENT (ECF No. 148)
AND REENTERING THIS
JUDGMENT TO ALLOW
DEFENDANT THE RIGHT
TO APPEAL;**
- 20 (5) **VACATING STATUS
HEARING; AND**
- 21 (6) **DENYING AS MOOT
MOTION FOR JOINDER
AND MOTION TO SUBMIT
CASE (ECF Nos. 180, 185)**
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1 **I. BACKGROUND**

2 **A. STATEMENT OF FACTS**

3 Defendant Watkins was charged with both conspiracy to recruit minor females
4 to engage in prostitution in violation of 18 U.S.C. § 1594(c), as well as the substantive
5 counts of sex trafficking children in violation of 18 U.S.C. § 1591(a) and (b). On
6 March 1, 2016, Watkins pled guilty to the conspiracy count. In exchange, the
7 Government agreed to drop the two substantive counts under which Watkins would
8 have faced a fifteen-year mandatory minimum sentence. (ECF Nos. 94, 95, 96, 98.)

9 As part of his guilty plea, Watkins admitted that he and co-conspirator
10 Bojorquez detained a 15 year old against her will for two days, told her she was going
11 to work as a prostitute for them, posted on-line advertisements including photographs
12 of her and another 15 year old, and rented a hotel room so the two minors could
13 conduct commercial sex acts. (Plea Agreement § II.B ¶¶ 1-4, 6, ECF No. 95.)
14 Watkins further admitted that when he and Bojorquez took the 15 year old to
15 Angelo's Burgers and told her to "make money for them or there would be
16 consequences," she began to cry and fled to a nearby bar, where she told the staff she
17 had been kidnapped. (*Id.* ¶ 7.) She was then allowed to call her father who brought
18 her home and called the police. (*Id.*)

19 In the Plea Agreement, the parties agreed that the Government would seek a
20 base offense level of 29 (starting at 30, with +2 for use of a computer, and -3 for
21 acceptance of responsibility), and Defense Counsel was free to argue the base offense
22 level should be 23 (starting at 24, with +2 for use of a computer, and -3 for acceptance
23 of responsibility). (Plea Agreement § XA.) The parties further agreed that the
24 ultimate decision as to the guideline range and final sentence would be in the sole
25 discretion of the sentencing judge and that the judge's failure to follow the Plea
26 Agreement would not give Watkins the right to withdraw his plea. (*Id.* § IX.)

27 "In exchange for the Government's concessions in th[e] plea agreement,"
28 Watkins agreed to waive, "to the full extent of the law, any right to appeal or to

1 collaterally attack the conviction . . . except a post-conviction collateral attack based
2 on a claim of ineffective assistance of counsel.” (Plea Agreement § XI.) Watkins
3 further agreed to waive “any right to appeal or collaterally attack his sentence” as
4 long as the Court did not impose a custodial sentence above the high end of the
5 guideline range recommended by the Government. (*Id.*; ECF No. 157, Ex. A at 9:17-
6 10:2).

7 After his guilty plea and before sentencing, Watkins dismissed the Federal
8 Defender who had been representing him, Mr. Johnson, and substituted in retained
9 counsel, Mr. Baum. (ECF No. 133.) On September 20, 2016, at sentencing, the
10 Court did not impose a custodial sentence above the high end of the guideline range
11 recommended by the Government, and thus confirmed with Mr. Watkins and his
12 attorney that Watkins had given up his right to appeal both the conviction and the
13 sentence as part of his Plea Agreement. (ECF No. 157, Ex. B at 27:10-14.) Both
14 counsel and Watkins confirmed this waiver. (*Id.*)

15 16 **B. Procedural History**

17 On November 22, 2016, Watkins wrote a letter to the Court complaining that
18 his attorney had been ineffectual, which the Court construed as a Motion to Vacate
19 pursuant to 28 U.S.C. § 2255. (ECF Nos. 150, 151.) In the letter, Watkins claimed
20 that his attorney “coerced me into signing a shammed plea agreement.” (ECF
21 No. 150.) Furthermore, Watkins argued that his attorney: (1) failed to present
22 exculpatory evidence; (2) did not investigate witnesses who would have made
23 statements on his behalf; and (3) misinformed him about the amount of time to which
24 he was exposing himself. (*Id.*) The Government filed a response to these allegations.
25 (ECF No. 157.) Watkins raised no issue regarding a failure to appeal.

26 After this Motion to Vacate was fully briefed, on September 29, 2017 (over a
27 year after he was sentenced), Watkins moved for leave to file an amended motion.
28 (ECF No. 160.) In this amended motion, Watkins raised very different claims of

1 ineffective assistance of counsel, arguing that his sentence was unconstitutional and
2 that his attorney was ineffective for failing to file a notice of appeal of the sentence,
3 which would have led to his successful claim that the Court’s guideline range
4 determination was in error. (*Id.*) The Government responded and requested that the
5 Court hold an evidentiary hearing at which Mr. Watkins’ attorney could be
6 questioned about his decision not to file a notice of appeal. (ECF Nos. 163, 164.)
7 The Court granted this request. (ECF No. 166.)

8 Just before the evidentiary hearing, Watkins filed a Supplemental Motion to
9 Vacate pursuant to 28 U.S.C. § 2255. (ECF No. 171.) This Supplemental Motion
10 largely repeated the allegations in the Amended Motion (ECF No. 160)—that
11 Watkins’ sentence was unconstitutional and that Mr. Baum’s assistance was
12 ineffective, but also argued that the Government had breached the Plea Agreement
13 because it had argued for an “illegal” sentence. (*Id.*) In this Supplemental Motion,
14 Watkins also requested appointment of counsel. (*Id.*)

15 The Court denied the request for appointment of counsel in light of the fact
16 that Watkins was able to retain an attorney for his original case and had made no
17 showing that he was indigent or unable to retain a lawyer to represent him at the
18 evidentiary hearing. (ECF No. 181.)

19 At the evidentiary hearing at which Watkins represented himself pro per, Mr.
20 Baum testified that he had never discussed filing an appeal with his client because
21 his client had waived his right to appeal. He specifically denied being instructed by
22 his client to file a notice of appeal. (ECF No. 181.) This testimony was contradicted
23 by both Watkins and his father who testified that they had told Mr. Baum to file a
24 notice of appeal but he refused. (*Id.*)

25 After the evidentiary hearing, the Court reconsidered its order denying counsel
26 for Watkins. (ECF No. 176.) In light of *United States v. Duarte-Higereda*, 68 F.3d
27 369 (9th Cir. 1995), the Court appointed Mark Adams to represent Watkins subject
28 to Watkins filing a Financial Affidavit establishing that he is, in fact, indigent and

1 unable to afford counsel. (*Id.*) The Court then reset the evidentiary hearing to give
2 Mr. Adams an opportunity to revisit the issue of a notice of appeal. (*Id.*)

3 The Government then notified the Court that, in order to avoid a second
4 evidentiary hearing, it was prepared to stipulate that *United States v. Sandoval-*
5 *Lopez*, 409 F.3d 1193 (9th Cir. 2000), had been violated. The Government argues
6 that the proper remedy for this violation is simply to reinstate the judgment to allow
7 Watkins to file his notice of appeal. The Government continues to oppose Watkins’
8 Motion to the extent he seeks to vacate his conviction or sentence on any other
9 grounds. (*Id.*) Mr. Adams argues that the sentence should be vacated and that
10 Watkins should be resentenced in light of *United States v. Wei Lin*, 841 F.3d 823 (9th
11 Cir. 2016).

12 13 **III. ANALYSIS**

14 **A. Legal Standard**

15 “[A] defendant who pleads guilty upon the advice of counsel may only attack
16 the voluntary and intelligent character of the guilty plea by showing that the advice
17 he received from counsel was ineffective.” *Lambert v. Blodgett*, 393 F.3d 943, 979
18 (9th Cir. 2004) (quoting *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985)). Even in a
19 claim of ineffective assistance of counsel for a guilty plea, Watkins must meet the
20 *Strickland* test; that is, he must show, first, “that counsel’s assistance was not within
21 the range of competence demanded of counsel in criminal cases” and, second, that
22 he suffered actual prejudice as a result of this incompetence. *Lambert*, 393 F.3d at
23 979-80; *Hill*, 474 U.S. at 57-58.

24 “A deficient performance is one in which counsel made errors so serious that
25 [h]e was not functioning as the counsel guaranteed by the Sixth Amendment.” *Iaea*
26 *v. Sunn*, 800 F.2d 861, 864 (9th Cir. 1986) (citing *Strickland v. Washington*, 466 U.S.
27 668, 687 (1984)). “Review of counsel’s performance is highly deferential and there
28 is a strong presumption that counsel’s conduct fell within the wide range of

1 reasonable representation.” *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1253
2 (9th Cir. 1987). The Court should not view counsel’s actions through “the distorting
3 lens of hindsight.” *Hendricks v. Calderon*, 70 F.3d 1032, 1036 (9th Cir. 1995)
4 (quoting *Deutscher v. Whitley*, 884 F.2d 1152, 1159 (9th Cir. 1989)), *vacated on*
5 *other grounds* *Angelone v. Deutscher*, 500 U.S. 901 (1991).

6 In order to satisfy the second “prejudice” prong in a guilty plea case,
7 “defendant must show that there is a reasonable probability that, but for counsel’s
8 errors, he would not have pled guilty and would have insisted on going to trial.” *Hill*,
9 474 U.S. at 59. If the claim is a failure to investigate, prejudice turns on “the
10 likelihood that discovery of the evidence would have led counsel to change his
11 recommendation as to the plea,” which in turns leads to an inquiry of “whether the
12 evidence likely would have changed the outcome of the trial.” *Id.*

13 14 **B. Initial Motion to Vacate**

15 In his initial Motion to Vacate (ECF No. 151), Watkins argues that his attorney
16 was ineffective because he “coerced me into signing a shammed plea agreement,”
17 failed to present exculpatory evidence, did not investigate witnesses who would have
18 made statements on his behalf, and misinformed him about the amount of time to
19 which he was exposing himself. Although Watkins requested an evidentiary hearing
20 on these issues, as discussed below, the Court finds that the allegations are so vague
21 and conclusory, or are belied by the record, that an evidentiary hearing is not
22 necessary. *See Shah v. United States*, 878 F.2d 1156, 1161 (9th Cir. 1989).

23 24 **1. Attorney Coercion**

25 With respect to the first claim, there are no allegations about how Watkins’
26 attorney—who he claims was retained counsel Mr. Baum, but who at the time he
27 pled guilty was actually Federal Defender Mr. Johnson—allegedly coerced him into
28 signing the Plea Agreement. And a review of both the signed Plea Agreement and

1 the plea colloquy belies this claim. Watkins initialed every page and signed the final
2 page of the Plea Agreement. (Plea Agreement, ECF No. 95.) In that signed and
3 initialed Plea Agreement, Watkins represented that no one had threatened him or his
4 family to get him to enter into the Plea Agreement, no one had made promises to him
5 other than those in the Plea Agreement, Watkins “had a full opportunity to discuss
6 all the facts and circumstances of this case with defense counsel,” and Watkins was
7 “pleading guilty because in truth and in fact [he] is guilty and for no other reason.”
8 (*Id.* § VI.) Watkins further certified that he had read the Plea Agreement (or it had
9 been read to him), and he understood its meaning in its entirety. (*Id.* § XV.) Finally,
10 in the written Plea Agreement, Watkins certified that he “is satisfied with counsel’s
11 representation” and “his counsel did not advise him what to say in this regard.” (*Id.*
12 § XVI.)

13 Similarly at the plea colloquy, Watkins told the Court he had gone over all of
14 the terms in the written Plea Agreement, was satisfied with his attorney, and had no
15 questions for the Court about his Plea Agreement. (ECF No. 55 at 8-9.) Given the
16 dearth of information about this allegation of coercion and the fact that it is clearly
17 contradicted by the record, Watkins has failed to make even a threshold showing that
18 his attorney’s performance was deficient because of coercion.

20 **2. Failure to Investigate or Present Exculpatory Evidence**

21 With respect to the claim that his attorney failed to present exculpatory
22 evidence and failed to investigate witnesses who would have made statements on
23 Watkins’ behalf, it is not clear if Watkins is referring to either: (a) evidence and
24 witnesses who might have testified if he had gone to trial, or (b) evidence and
25 witnesses at his sentencing hearing. Since he refers to Mr. Baum, and Mr. Baum was
26 only his attorney for sentencing, the Court looks first to the evidence and witnesses
27 at the sentencing hearing.

1 Mr. Baum not only filed Objections to the Presentencing Report (ECF No.
2 135) and a Sentencing Summary Chart (ECF No. 137), but he also filed a Sentencing
3 Memorandum with various supporting exhibits and documents (ECF No. 147) and
4 Supplemental Letters and Exhibits (ECF No. 142), including a letter from Watkins
5 and certificates showing he had completed various self-improvement courses while
6 in custody (ECF No. 142). Clearly, Mr. Baum presented statements and exhibits on
7 Watkins' behalf at the sentencing hearing. Given the fact that this was a hearing for
8 sentencing after a guilty plea, presentation of exculpatory evidence would not have
9 been appropriate, but Mr. Baum presented evidence supporting his claim that
10 Watkins was entitled to a reduced sentence. Watkins fails to show that this
11 representation "was not within the range of competence demanded of counsel in
12 criminal cases." *See Lambert*, 393 F.3d at 979-80.

13 To the extent Watkins is referring to the Federal Defender who represented
14 him at the time he pled guilty, Watkins fails to point to what exculpatory evidence or
15 witnesses Mr. Johnson failed to investigate. Therefore, he makes an inadequate
16 showing of deficient performance.

17 Furthermore, Watkins fails to present sufficient evidence that but for these
18 alleged deficiencies he would have insisted on going to trial. Watkins' original
19 charges exposed him to a fifteen-year mandatory minimum. His counsel managed to
20 strike a plea agreement with the Government that reduced this exposure. It limited
21 the Government to recommending a sentence of no more than 135 months. The Court
22 eventually sentenced Watkins to 120 months, well below the fifteen years he had
23 been facing if he had gone to trial. (ECF No. 148.) Watkins does not claim that he
24 would have gone to trial if his attorney had investigated this amorphous exculpatory
25 evidence. Hence, he fails to meet the second prong as well.

1 **3. Misinformation About Amount of Time He Was Facing**

2 Finally, Watkins claims his attorney misinformed him about the amount of
3 time he was facing. Again, this claim is completely belied by the record.

4 In the written Plea Agreement, initialed and signed by Watkins, he
5 acknowledged that he was facing a maximum term of life in prison. (Plea Agreement
6 § IIIA.) Watkins further initialed that he understood “the [Sentencing] Guidelines
7 are only advisory, not mandatory, and that the Court may impose a sentence more
8 severe or less severe than otherwise applicable under the Guidelines, up to the
9 maximum” possible sentence that Watkins had acknowledged was life in custody.
10 (*Id.* § VIII.)

11 Watkins also recognized in the Plea Agreement that “the sentence is within the
12 sole discretion of the sentencing judge . . . Defendant understands that the sentencing
13 judge may impose the maximum sentence provided by statute, and is also aware that
14 any estimate of the probable sentence by defense counsel is a prediction, not a
15 promise, and is not binding on the Court.” (Plea Agreement § IX.) Furthermore, “it
16 is uncertain at this time what Defendant’s sentence will be,” and “if the sentencing
17 judge does not follow any of the parties’ sentencing recommendations, Defendant
18 nevertheless has no right to withdraw the plea.” (*Id.*)

19 This was reinforced during the plea colloquy, when Watkins was informed
20 orally that the maximum penalty was life in custody; that the guidelines were
21 advisory, not mandatory; and that the sentencing judge was not bound by the
22 sentencing guidelines but could vary up to the maximum of life in custody. (ECF
23 No. 155 at 6-7.) Thus, Watkins was clearly informed that he was facing a potential
24 sentence of life in custody.

25 But, more specifically, the United States agreed in the Plea Agreement that it
26 would recommend a base offense level of 29 (resulting in a guideline range of 108-
27 135 months), and Watkins’ attorney would recommend a base offense level of 23
28 (resulting in a guideline range of 57-71 months), but it would be up to the judge to

1 decide the appropriate sentence. (Plea Agreement § X). Thus, Watkins knew the
2 Government would be arguing for a sentence of up to 135 months. He was not
3 misinformed about the sentence he was facing.

4 Furthermore, Watkins’ statement that “if Baun¹ had provided me with the
5 correct information about the amount of time I was exposing myself to . . . I may
6 have just went to trial” (ECF No. 151) is an insufficient showing of prejudice.

7 Because Watkins has failed to show either that his attorney’s performance was
8 deficient or that he suffered prejudice as result of any alleged deficiency, the Court
9 **DENIES** Watkins’ original Motion to Vacate (ECF No. 151).

10 11 **C. Amended Motion to Vacate**

12 In his Amended Motion to Vacate (ECF No. 160), Watkins argues first that
13 *United States v. Wei Lin*, 841 F.3d 823 (9th Cir. 2016)—which was decided after he
14 was sentenced—shows that the Court erroneously determined Watkins’ base offense
15 level. However, in his Plea Agreement, Watkins agreed to waive any right to appeal
16 *or collaterally attack* his sentence so long as the Court did not impose a custodial
17 sentence above the high end of the guideline range recommended by the Government.
18 (Plea Agreement § XI.)

19 In the Plea Agreement, the Government agreed it would recommend a base
20 offense level no higher than 29. Since Watkins’ criminal history category was III,
21 the Government agreed as part of the Plea Agreement that it would recommend a
22 sentence no higher than 135 months in custody. In fact, the Government
23 recommended a sentence of 120 months in custody (ECF No. 139), and the Court
24 followed this recommendation. (ECF No. 148.) Since the Court did not impose a
25 custodial sentence above the high end of the guideline range recommended by the
26 Government, Watkins has waived his right to collaterally attack this sentence. *See*

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28 ¹ Presumably Watkins is referring to Mr. Baum, even though he was not Watkins’ attorney
at the time Watkins entered his guilty plea.

1 *United States v. Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991) (“[A]n express waiver
2 of the right to appeal in a negotiated plea of guilty is valid if knowingly and
3 voluntarily made.”)

4 However, Watkins also argues that his retained attorney was ineffective
5 because he failed to file a notice of appeal despite Watkins’ request that he do so.
6 Watkins did not waive his right to collaterally attack the conviction or sentence based
7 on ineffective assistance of counsel.

8 In *United States v. Sandoval-Lopez*, 409 F.3d 1193 (9th Cir. 2000), the Ninth
9 Circuit held that an attorney’s refusal to comply with a defendant’s specific
10 instruction to file an appeal constitutes ineffective assistance of counsel. This is true
11 even if the defendant clearly waived his right to appeal as part of the plea agreement.
12 *Id.*; see also *Roe v. Flores-Ortega*, 528 U.S. 470, 471 (2000) (“This is so because a
13 defendant who instructs counsel to initiate an appeal reasonably relied upon counsel
14 to file the necessary notice.”).

15 If a defendant files a habeas petition alleging that this rule has been violated,
16 and the Government does not object, “the district court can vacate and reenter the
17 judgment without a hearing to allow the appeal to proceed, assuming without
18 deciding that the petitioner’s claim is true.” *Sandoval-Lopez*, 409 F.3d at 1198. It is
19 this remedy that the Government acquiesces to in this case.

20 Thus, the Court assumes, without deciding, that Watkins’ claim is true to the
21 extent he claims that *Sandoval-Lopez* was violated in this case. Therefore, the Court
22 agrees to vacate and reenter the judgment without a further hearing to allow the
23 appeal to proceed.

24 25 **D. Supplemental Motion to Vacate**

26 In his Supplemental Motion to Vacate (ECF No. 171), Watkins adds an
27 argument that the Government breached the Plea Agreement because it argued for an
28 “illegal” base offense level. Again citing *United States v. Wei Lin*, 841 F.3d 823 (9th

1 Cir. 2016)—which was decided after Watkins was sentenced—Watkins argues that
2 this case demonstrates that the Government’s recommendation was “illegal” and,
3 therefore, should be vacated.

4 As discussed above, Watkins waived his right to make this argument as part of
5 his Plea Agreement. The Government reached its Plea Agreement with Watkins and
6 made the arguments at sentencing based on the law in effect at the time. *Wei Lin* had
7 not yet been decided. Therefore, the Government argued the Court could impose a
8 base offense level based on the substantive counts that formed the basis for the
9 conspiracy.² Watkins pled guilty knowing what he was facing and accepting that
10 possibility. He received the benefit of his Plea Agreement bargain. He has failed to
11 demonstrate that the Government breached its Plea Agreement.

12 13 **III. CONCLUSION**

14 In light of the foregoing:

15 1. Watkins’ Motion to Vacate (ECF No. 151) and Supplemental Motion to
16 Vacate (ECF No. 171) pursuant to 28 U.S.C. § 2255 are **DENIED**.

17 2. Watkins’ First Amended Motion to Vacate under § 2255 (ECF No. 162)
18 is **GRANTED IN PART and DENIED IN PART**.

19 3. The Court **VACATES** the original judgment (ECF No. 148) and
20 **REENTERS** this judgment without a further hearing to allow Watkins’ appeal to
21 proceed.


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25 ² In hindsight, the Ninth Circuit has now determined that this base offense level was
26 incorrect. However, continuing this argument to its logical conclusion shows the danger of looking
27 at circumstances in hindsight. If *Wei Lin* had been in effect at the time the Government entered
28 into a plea agreement with Watkins, the Government might not have agreed to dismiss the 15-year
mandatory minimum count, believing that the reduced sentence would have been insufficient. A
look at the factual basis admitted by Watkins in his Plea Agreement demonstrates that there was a
sufficient factual basis for the Government to proceed to trial on the 15-year mandatory minimum
substantive counts. Looking through the distorted lens of hindsight is impossible and improper.

1 4. The Motion for Joinder (ECF No. 180) and Motion to Submit Case for
2 Final Decision (ECF No. 185) are both **DENIED** as moot.

3 5. The status hearing set for June 25, 2018, is **VACATED**.

4 **IT IS SO ORDERED.**

5
6 **DATED: June 22, 2018**


Hon. Cynthia Bashant
United States District Judge